IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10211 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

AJUBHA KABBHA GOHIL

Versus

STATE OF GUJARAT

Appearance:

MS SUBHADRA G PATEL for Petitioner

MR KT DAVE A.G.P. for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 21/02/2000

ORAL JUDGEMENT

Heard learned advocate Ms. Subhadra Patel for the petitioner and learned A. G. P. Mr. K. T. Dave for the respondents Nos. 1, 2 and 3.

1. The detention order dated 7.6.1999 passed by the respondent No. 2, District Magistrate, Bhavnagar against the petitioner, in exercise of powers conferred under Section 3(1) of the Gujarat Prevention of Antisocial Activities Act, 1985 ("PASA" for short) is challenged in the present proceedings under Article 226 of the Constitution of India.

2. The grounds of detention served upon the detenu under Section 9(1) of the "PASA", interalia indicate that eight prohibition cases were registered against the petitioner in between 16.10.1998 to 11.5.1999 at Alang Police Station and country made liquor alongwith instruments of distilary were seized. That except the case, registered vide CR. 145/99 dated 11.5.1999, all the cases are pending for trial in the Court while the said case is pending for further investigation.

Further more three witnesses on assurance of their anonymity have given statements dated 13.5.1999, indicating the alleged bootlegging activities of the petitioner on different dates, prior to date of statements.

3. That on the basis of above stated material, the respondent No. 2 as Detaining Authority has come to the conclusion that the detenu is a "bootlegger" within the meaning of Section 2(b) of "PASA". That enforcement of general provisions of law being insufficient to prevent the petitioner from continuing his bootlegging activities, and thereby, in order to prevent the petitioner from continuing his such activities, the impugned order is passed.

4. The petitioner has challenged the impugned order on numerous grounds. It has been contended at the Bar on behalf of the petitioner that the impugned order suffers from vice of non application of mind in as much as the petitioner is released on bail in the cases pending for trial in the Court. However, the Detaining Authority has failed to show the status of the petitioner on the date of passing of the impugned order and has failed to consider the aspect of claiming cancellation of bail as available under Section 437(5) of Cr. P. C.

5. It is noteworthy that in the matter of ZUBEDABIBI RASIDKHAN PATHAN VS. STATE OF GUJARAT reported in 1995(2) G.L.R. , 1134, the Division Bench of this Court has expressed the view that non consideration of less drastic remedy available under Section 437(5) of the Cr.

P.C. to claim cancellation of bail amounts to non application of mind which vitiates the subjective satisfaction rendering the detention order bad in law. That the said view has been approved and endorsed in the proceeding of Letters Patent Appeal No. 1058 of 1999 decided on 15.9.1999 by this Court (Coram : C. K. Thakkar & A. L. Dave, JJ.)

6. On scrutiny of grounds of detention, it appears that in paragraph 5, the Detaining Authority has observed that as witnesses are not willing to come forward due to fear of the petitioner, it is necessary to detain the petitioner under "PASA". However, no where it is stated that whether the petitoner was in jail or judicial custody. Further more, that the material placed before the Detaining Authority included the bail application and orders passed by the Competent Court. The grounds of detention does not disclose any fact, from which reasonable inferance could be drawn that the Detaining Authority has considered the aspect of claiming of cancellation of bail as available under Section 437(5) OF Cr. P. C. in the pending cases against the petitioner. Thereby, there is clear non application of mind as apperant from the grounds of detention and the detention order could be hardly be sustained.

6. As the petition succeeds on the aforesaid grounds alone, it is not necessary to consider and decide, the other contention raised in the petition.

7. On the basis of the aforesaid discussion, the petition is allowed. The detention order dated 7.6.1999 passed by the respondent No. 2 against the petitioner is hereby quashed and set aside. The petitioner Ajubha Kanbha Gohil is ordered to be set at liberty forthwith, if not required in any other case. Rule is made absolute to that extent.

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Date : 21.02.2000. (A. K. Trivedi, J.)

PALLAV.